SUPREME COURT, U. S.

Supreme Court, U.S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

No. 71-698

JAMES O. EVANS,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION OF THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner James O. Evans respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 13, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 446 F.2d 821, and appears as Appendix A hereto. No opinion was rendered by the District Court for the Middle District of Florida; its Order and Judgment appears as Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 13, 1971 and appears as Appendix B hereto. A timely petition for rehearing was denied on September 2, 1971, the Order appearing as Appendix C, hereto. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act, 5 U.S.C. §552, requires disclosure of certain letters of allegation held by the Federal Aviation Administration concerning petitioner's fitness as a pilot;

(A) Where the "confidential informant" may be dead;

(B) Where the investigation was concluded over a decade in the past;

(C) Where the letters were written for the purpose of improperly influencing an arbitrator, and resulted in the destruction of petitioner's career.

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides:

> §552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of this court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(b) This section does not apply to matters that are—

* * *

(3) specifically exempted from disclosure by statute;

* * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

* * *

Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provision of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

STATEMENT OF THE CASE

From 1941 until April 15, 1960 petitioner James O. Evans, was employed by Pan American World Airways, Inc., as a co-pilot and captain. On April 15, 1960 Evans was fired by Pan American for reasons unspecified by the carrier.

Evans pursued his contractual and administrative remedies against his discharge, which resulted in the establishment of a System Board of Adjustment pursuant to the provisions of the Railway Labor Act. 45 U.S.C. §184.

Sometime in October, 1960, while the administrative procedures were in progress, and prior to a decision of the "neutral" arbitrator regarding the carrier's failure to specify charges against Evans and Evans' discharge, the Federal Aviation Administration received certain letters from a person or persons or an organization still unknown to Evans. (R. 10; App. 14-15). Petitioner believes and alleged that these letters were sent by officials of Pan American and that they contained false allegations regarding his mental fitness and abilities as a pilot.

As a result of these letters of allegations the Federal Aviation Administration summarily granted an emergency suspension of petitioner's medical certificate and required him to undergo psychiatric evaluation and testing to obtain its return. The conclusions from the favorable report of Philip B. Phillips, M. D., praising Evans for his "methodical, slow, thoughtful, conservative, conscientious approach", are contained in the doctor's affidavit. (R. 14; App. 16-18). In this conclusion Dr. Phillips specifies that:

"This patient is undergoing psychiatric evaluation at the request of the Federal Aviation Agency, which removed his medical certification in January, 1961, *as a result of certain actions taken by Pan American Air Lines*, for which the patient had worked as an airline captain for many years." (R. 14; App. 17).

After Pan American had obtained the suspension of Evans' medical certificate by the false allegations in these letters, it used the fact of this "psychiatric" suspension in order to improperly and fraudulently prejudice the arbitrator against Evans, by improperly advising the "neutral" arbitrator of the suspension. This course of conduct is clearly shown in the deposition of the attorney who represented Evans in the administrative hearing. (R. 8; p. 7). He described the "neutral" arbitrator's conduct as follows:

"Q. (By Mr. Horn) Did Wallen [the arbitrator] mention the lifting or the suspension of Captain Evans' medical certificate?

A. (Mr. Schy) Yes, that was one of the specific items that he mentioned with great emphasis.

Q. All right. Do you recall specifically what he said about that?

A. Yes, I do. He said that I knew as well as he that even the FAA knew that Evans wasn't fit to fly as an airline pilot, that the FAA had been so concerned about Evans' qualifications that they had jerked his certificate on a summary or emergency basis, which clearly indicated that they considered Evans to be some sort of nut.

I remember him using that word nut.

> Q. Did Wallen say who had advised him concerning the suspension of the certificate or as to the other matters that he related to you?
> A. I asked where he had gotten that information, as well as the other information about the other episodes that he described, and his answer to each such inquiry was 'never mind where I got it,' or—well, I think basically that is what he said, 'You just never mind where I got it; I got it,'" (R. 8, pp. 19-20).

At this time, of course, neither Evans nor his attorney knew what the origin of the "emergency psychiatric suspension" had been, (R. 8, p. 10), or how it had been instigated by Pan American in order to be improperly used against him in the arbitration proceeding. In the course of the arbitration proceedings the arbitrator ruled that precise charges would have to be made against Evans. Once these charges were made, however, the discharge was sustained and Evans career as a pilot was ruined.[1]

Subsequent to this time, Evans has sought to determine how this suspension came about. As a result of senatorial inquiry in 1962 he was initially advised that "an anonymous letter" had been received by the FAA. In 1964

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[1]The opinion of the Court of Appeals below contains a glaring factually incorrect statement that "[As a result of arbitration, Evans was also rehired by Pan American]", 446 F. 2d at 822, App. A hereto, p. 2. The record is plain on this point that Evans was *not* rehired and the respondent has not contended to the contrary. From this misapprehension of fact, the Court of Appeals opined that Evans' interest in this matter was confined to "personal curiosity", 446 F. 2d at 823, Appendix A, p. 5, rather than any more substantial interest. Although this was specifically brought to the Court of Appeals' attention on the Petition for Rehearing, the Court declined to even correct its opinion by deleting the inaccurate sentence.

he was advised by the General Counsel of the FAA that there was "no anonymous letter." (R. 4; App. 10). In 1966 he was finally advised that there were letters which were not anonymous, and in 1968 the Agency formally refused to comply with his request to obtain the letters under the Freedom of Information Act, 5 U.S.C. §552.

This suit was then filed to obtain disclosure of these letters. After the filing of an Amended Complaint (R. 3; App. 1-6), the defendant Department of Transportation filed its Answer (R. 4; App. 7-13) admiting the existence and its receipt and continued possession of the letters. The defendant then moved for a Summary Judgment based upon its claims of exemption from the Freedom of Information Act under certain specific provisions of the Act. (R. 9; App. 12). In an affidavit, the Administrator of the FAA claimed that the author of the letters in the initial letter, "indicates his concern about difficulties he might encounter if he names the pilot." (R. 10; App. 14). After alleged assurances, the author then wrote, naming the plaintiff, and making the false allegations.

In discovery, it was revealed that the FAA had had no further contact with the author of the letters since its receipt of them, *and that it had no idea whether the author was alive or dead at the present time.* (R. 19, 21; App. 20, 23-4).

The District Court ordered that the original letters be produced for an *in camera* inspection by the Court. (R. 20; App. 22-23). After the *in camera* inspection the District Court granted the defendant's Motion for Summary Judgment (R. 25; App. 24-25). On Motion for Rehearing filed by the plaintiff, the Court granted a re-

hearing, and after oral argument entered its Order and Judgment (R. 29; Appendix D hereto, p. 13) again granting defendant's Motion for Summary Judgment and dismissing the case. In this Order the Court specified two statutory exemptions from disclosure; 5 U.S.C. Section 552(b)(7), the "investigatory files" exemption, and 5 U.S.C. Section 552(b)(3), which exempts matter "specifically exempted by statute." In this connection the Court cited 49 U.S.C. Section 1504.

The Court of Appeals following argument and an *in camera* inspection of its own, affirmed, relying upon the same provisions. (Appendix A, p. 1-7).

REASONS FOR GRANTING THE WRIT

This case involves important and substantial issues arising under the Freedom of Information Act, 5 U.S.C. §552.

This Court has not, as yet, granted plenary review to any decision involving this statute. The fundamental issues of citizen access to government information which are presented in cases under the statute, however, are rapidly coming to the fore, frequently with explosive potential. E.g., *Committee for Nuclear Responsibility v. Seaborg*, 40 U.S. Law Week 2249 (D.C. Cir. October 28, 1971); Cf. *Committee for Nuclear Responsibility v. Seaborg*, 40 U.S. Law Week 2250 (D.C. Cir. November 3, 1971), *Committee for Nuclear Responsibility v. Schlesinger*, ____ U.S. ____, 40 U.S. Law Week 3214 (November 6, 1971).

The scheme of the statute is clear and straightforward. The Government is required upon proper request to produce "identifiable records * * * except as specifically stated in this section". 5 U.S.C. §§ 552(a)(3), (c). Judicial review of withholding from disclosure is to be "de novo and the burden is on the agency to sustain its action". 5 U.S.C. § (a)(3).

If the petitioner is correct in his belief that the letters sought to be discovered in the present case were, in fact, written by or at the direction of officials of Pan American World Airways, Inc., an enormous and flagrant misuse of the processes of governmental regulation will have occurred, cloaked heretofore in a veil of silence. The petitioner seeks the production of these letters in order to clear his name and to seek redress for the destruction of his reputation and career which has directly resulted from them. It is the belief of the petitioner that these letters were written by officials of Pan American for the purpose to which they were put, i.e., to falsely and materially prejudice a so-called "neutral" arbitrator by giving the impression reinforced by governmental action that the petitioner was mentally unfit to be a pilot. It is difficult to conceive a more devastating and destructive charge against an airline pilot than that of mental unfitness.

For years the government maintained a fiction of "anonymous" letters, then it denied the existence of letters, and only years after the event did it admit of the existence of signed letters and invoke a refusal to disclose them, when a proper request for these identifiable records was made.

This case presents an appropriate vehicle for this Court to resolve a number of conflicts in principle which have arisen in litigation under the Freedom of Information Act, and to give needed guidance to the federal courts in their interpretation of this vital statute.

Substantial litigation has taken place in the federal courts since the effective date of the statute,[2] involving the specific exemption from disclosure provision most frequently relied upon by the Government to justify its refusal to disclose information and relied upon by the Government here, 5 U.S.C. §552(b)(7). This exemption from disclosure applies to:

> "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The Senate Committee Report, described the purpose of this exemption:

> "These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." Senate Report No. 813 on S. 1160, 89th Cong., 1st Sess. at 9 (1965).

This statutory language and history has led to a line of decisions, with which the decision below clearly conflicts in principle. These decisions include *Bristol-Meyers v. Federal Trade Commission*, 424 F. 2d 935 (D.C. Cir.

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[2]July 4, 1967.

1970); *Wellford v. Hardin*, 444 F. 2d 21 (4th Cir. 1971); *Barceloneta Shoe Corporation v. Compton*, 271 F. Supp. 591 (D.P.R. 1967); and, *Cooney v. Sun Shipbuilding Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

In the *Bristol-Meyers* decision the Court of Appeals for the District of Columbia characterized the purpose of the exemption as "intended to limit persons charged with violations of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law." 424 F. 2d at 939. Another decision to the same effect is *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967).

Throughout the case at bar, the Respondent Government has claimed that the author of the letters which are sought to be disclosed is a "confidential informant" whose communications the Government is privileged to shield. In *Roviaro v. United States*, 353 U.S. 53 (1957), however, the leading decision on disclosure of an informer's identity, this Court said:

> "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of the informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.
>
> "FN8 — The record contains several intimations that the identity of John Doe was known to petitioner and *that John Doe died prior to the trial.*

> *In either situation, whatever privilege the Government might have had would have ceased to exist,* since the purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct." 353 U.S. at 60. (Emphasis added).

The Government admitted in the District Court below (R. 21; App. 23-4) that it has made no attempt to contact the "informant" and has no idea whether the author is alive or dead. If he is dead there is no basis for the assertion of any "confidential informant" privilege.

The District Court's decision below was a Summary Judgment, which ignored the existence of a disputed issue of material fact, i.e., the life or death of the informant. If the author is dead, which petitioner believes, there is no basis whatever for the Government's assertion of privilege. The saving provision in the exemption for "investigatory files" allowing disclosure *"to the extent available by law to a party other than an agency,"* 5 U.S.C. §552(b)(7) would be plainly applicable. This analysis is in accordance with the Attorney General's published Memorandum on the Public Information Section of the Administrative Procedure Act (1967) at p. 38:

> "The effect of the language in exemption (7), on the other hand, seems to be confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants."

A second line of decisions with which the decision below conflicts in principle involves the invocation by the Government of the "investigatory files" exemption, over a decade after the purpose of the investigation has ceased to exist.

It was early held in analyzing this provision and its legislative history that:

> "First, a primary purpose of the exemptive provision in question is to avoid a *premature* disclosure of an agency's case when engaged in law enforcement activities. * * * Second, by its terms and tenor, the statute creates no new exemption for agency files; in the several exemptive provisions it merely recognizes and codifies the existing judicially and congressionally created exemptions." *Cooney v. Sun Shipbuilding & Drydock Company*, 288 F. Supp. 708, 709-10 (U.S.D.C. E.D. Pa. 1968). (Emphasis in original).

Similarly the Court of Appeals for the Fourth Circuit recently held in *Wellford v. Hardin* 944 F. 2d 21, 23, (4th Cir. 1971):

> "We agree with the district court that the legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding. The reports of the House Government Operations Committee and the Senate Judiciary Committee define the purpose of the exemption as the protection of the government's case in court."

To the same effect is *Getman v. NLRB*, 40 U.S. Law Week 2126, 2127, (D.C. Cir., August 31, 1971). The Court of Appeals for the District of Columbia has also held in *Bristol Meyers v. FTC, supra:*

> " • • • the agency cannot, consistent with the broad disclosure mandate of the Act protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified *future* date". 424 F.2d at 939 (Emphasis added).

Where, the events, as here, have taken place ten years in the past and the Government's proceedings are long since over, the application of the "investigatory files" exemption is plainly unwarranted and in conflict with the principles set out in the foregoing decisions, and with the legislative history of the statute.

The second exemption cited by the Court of Appeals below is contained in 5 U.S.C. §552(b)(3) which exempts from disclosure matters that are "specifically exempted from disclosure by statute." The statute which is said to "specifically" exempt these letters is 49 U.S.C. §1504.[3]

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[3] "Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board of the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress."

The Court of Appeals characterized the objections of the author stated in the initial letter as a "running, permanent objection to the disclosure". (App. A, p. 7, 446 F.2d at 824). Petitioner submits that by giving effect to such an objection, reaching probably beyond the grave, the Court of Appeals below has given undue weight to the governmental policy of concealment, particularly where, as here, governmental regulatory processes have been blatantly misused.

The government has in no manner specified how the disclosure of these letters would, "adversely affect the interests of such person", i.e., the author of the letters. As previously stated, it is plaintiff's belief that these letters were inspired by his former employer, Pan American, in order to materially and fraudulently affect his pending discharge proceeding. Any statutes of limitations for libel have long since expired as to the individual author of the letters. Possible adverse effects upon Pan American, which is neither the author of the letters nor the "person" who has allegedly objected to the disclosure, are *not* grounds under this statute to prevent disclosure.

Additionally a "public interest" in preventing the manipulation of the processes of governmental regulation for private ends is clearly discernible in this case. Disclosure of these letters *is* "required in the interest of the public" in order to right the monumental injustice which has pervaded the treatment of the plaintiff by his employer and by the government. The destruction of an individual's career and reputation in the manner described in the record of this case requires disclosure of these documents.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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